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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH SALAZAR, Defendant and Appellant.	B275477 (Los Angeles County Super. Ct. No. BA430772)

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Shawn McGahey Webb and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Joseph Salazar of the second degree murder of Sergio Guzman, and found true that he intentionally discharged a firearm causing death and that the crime was committed for the benefit of a criminal street gang. (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d), & 186.22, subd. (b)(1)(C).)[1] He was 16 years old at the time of the crime, but 22 years old at the time of trial and sentencing.[2] The trial court sentenced him to 40 years to life in state prison. He appeals from the judgment of conviction, contending that the trial court erred in: (1) admitting two recordings, made while appellant was in custody awaiting trial, in which he expressed a willingness to plead guilty to a determinate term to avoid a life sentence; (2) conditioning the admissibility of excluding expert testimony on why innocent defendants consider pleading guilty on appellant taking the stand: and (3) refusing to instruct the jury on third-party culpability. He also contends that the case must be remanded for him to make a record relevant to his future youthful offender parole hearing under *People v. Franklin* (2016) 63 Cal.4th 261. We disagree with these claims, and affirm the judgment.

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[1] Undesignated section references are to the Penal Code.

[2] According to the probation report, appellant's date of birth is March 13, 1994. The murder was committed on November 12, 2010. Trial began March 9, 2016 and the verdict was returned on March 21, 2016. Appellant was sentenced on June 9, 2016.

BACKGROUND

The Murder

On November 12, 2010, about 9:30 p.m., Los Angeles County Deputy Sheriff Gerardo Magos and his partner, Guillermo Sanchez, were on patrol near 6th and Bonnie Beach Place in East Los Angeles when they observed three people, one of whom was later identified as appellant, run into a mini mart named Yoly's Market. The deputies contacted appellant and the other two males inside the market. Appellant was wearing a black hooded sweater, blue jeans, and black shoes. He was with Christopher Alvarez, who was wearing a blue flannel shirt and shorts, and Alonso Diaz, who was wearing a gray Raiders jacket, black pants, and black shoes. Appellant told the deputies that he belonged to the Little Valley gang and used the moniker "Blinks." Alvarez and Diaz also said they belonged to the same gang.

Later than night, around 10 or 11 p.m., Roxanne Sanchez, her boyfriend, Sergio Guzman, and Roxanne's sister Erika went to a party on Indiana Street in East Los Angeles. Guzman had a "noz tank," slang for a nitrous oxide tank, and was selling nitrous oxide balloons in the driveway.

Around 11:55 p.m., Roxanne saw three or four people confronting Guzman. Guzman said, "I'm not going to give you anything." One of the men cursed Guzman, pulled out a gun, and shot him twice.

Bryan Valencia, who was acting as a security guard at the party, observed three men arguing with Guzman. Valencia was within arm's length of one of the men, who was wearing a black hoodie with the hood

up (Valencia could not see the man's face clearly). The man took out a black revolver and pulled the trigger, but the gun did not fire. The man then pulled the trigger again and shot Guzman.

A subsequent autopsy revealed that Guzman suffered two gunshot wounds: a fatal wound to the head, with the entry wound on the right cheek, and another wound to the right leg. The projectiles were removed from the body. From the stippling around the entry wound on the cheek, it could be inferred that the shooter was no more than two feet away when the gun was fired.

Los Angeles County Sheriff's Sergeant Robert Gray arrived at the murder scene around 2:30 a.m. on November 13, 2010. He talked to Erika Sanchez.[3] Erika said that she saw a man wearing a black hoodie confront Guzman, who said something like "No, nah." The other man said something like "All right, then, fool," produced a black handgun from his waistband, and shot Guzman. Guzman fell, and the shooter ran away. Erika described the shooter as a male, between the ages of 17 and 19, about five feet six or eight inches tall (taller than Guzman), with a thin build, and wearing a black hooded sweatshirt with a blue and white bandana around his neck.

Detective Gray spoke to Valencia, who described the shooter to a deputy sheriff as being between 17 to 19 years old, five feet nine inches tall, 235 pounds, heavyset, having big cheeks, not having facial hair, dark complected, and wearing a black hooded sweatshirt over his head.

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[3] Erika was a reluctant witness at trial. She testified that she did not see Guzman get shot and did not remember what she saw.

Four days after the shooting, on November 16, 2010, Elipidio Duarte, whose home was near Yoly's Market, found a gun near a tree in his backyard. About 20 minutes later, a deputy sheriff arrived, asked to come in, went into the backyard, and recovered the gun. About two days later, two teenage boys (Duarte thought they might be gang members) came to Duarte's house and asked if they could go to his backyard to find a lost wallet. Duarte let them into his backyard. On a later occasion, the boys came back and told Duarte they were looking for a gun.

The recovered gun was a Taurus brand model 66 revolver. It had two live .38 caliber cartridges. One live cartridge had a light firing pin impression on the primer, which indicated a misfire. A comparison of test-fired bullets to the bullets removed from Gallegos' body by the coroner showed that the bullets were fired from the revolver.

Alonzo Diaz' Testimony

Alonzo Diaz, who belonged to the Little Valley gang (though he was no longer active), testified for the prosecution at trial. In July 2013, Diaz was in custody for robbery, and had received an offer of 15 years from the prosecution. He then received an offer of five years. In order to help himself, he provided information to Sergeant Gray on two crimes committed by Little Valley gang members and received a grant of use immunity for his testimony at the preliminary hearings. After that, Diaz was "green lighted," and an attempt was made on his life (he escaped being shot). He was placed in protective custody, and accepted

the five-year deal on his robbery charge. When he testified against appellant, he was serving the five-year sentence.

The first case Diaz provided information on was an attempted murder in which Phillip Gallegos (known as "Goofy" and "the big homie"), Christian Alvarez ("Gunner" and "Lil' Smokey"), and Jony Banuelos ("Lil' Troubles") were involved. The second case was the murder of Sergio Guzman, in which Diaz implicated appellant.

According to Diaz, appellant was a Little Valley gang member with the moniker "Klepto." In March 2012, Diaz was charged with receiving stolen property and was released on bail. About a week after his release, he had a conversation with appellant in which appellant bragged about "putting in work" for the gang. Appellant said he went to a party with Christopher Alvarez. Jose Sevilla was also there. Appellant told Diaz that he asked a man selling noz balloons if he was going to give him free balloons the rest of the night. The man said no. Appellant asked the man if he knew where he was, and the man said he was in "CLPS hood." "CLPS" stood for Clika Los Primos, a rival gang to Little Valley. Hearing that response, appellant shot the man in the face and ran to Lanfranco Street. He called Phillip Gallegos to pick him up. Gallegos did so and "saved him."

Appellant was "paranoid" because he could not find the gun, a black .357. He said that he and other Little Valley members stashed the gun near some trees in a backyard on 6th Street, two houses from Yoly's Market. Later, they could not find the gun. They went back to the house and offered money for its return. The resident did not have it.

Philip Gallegos was on parole and his movements could be tracked by Global Positioning Satellite (GPS) information. That information showed that he was in the area of the shooting from 11:48 to 11:59 p.m. Specifically, at 11:59 p.m., Gallegos was at Lanfranco and Rowan. After that time, Gallegos was still in the area until at least 12:10 a.m.

Alvarez' Recorded Conversation with Appellant

On July 7, 2011, appellant and Christopher Alvarez were placed together in a holding cell and their conversation was recorded. Part of their conversation referred to the murder weapon. Alvarez said that Detective Gray told him that "they found a big item. And that they're going to compare that DNA." Appellant asked, "What big item? I'm positive it's cleaned." Alvarez said, "Probably the burner," referring to the gun. Appellant replied, "The burner, that night. Before I had it. I tossed it away. I cleaned that shit, bro. I cleaned it after that. I put it away, ese." Alvarez asked where, and appellant replied, "[w]here the fool gave it back to the cops."

Jose's Sevilla's Interviews With Law Enforcement

At trial, Jose Sevilla was a reluctant witness and was impeached with prior statements.

On June 23, 2011, Jose, then a juvenile, was brought in from Camp Paige and was interviewed by Sergeant Gray. After the interview, Jose was placed in a booking cell, and his call to Benjamin Armiento was recorded. In the call, Jose said they were trying to blame him for a murder at a party; he was at the party; "it was my homie

dude, he's in camp there with me now"; "it was my dog"; "he was the shooter"; they took DNA from his mouth; and the shooter was in the bed next to his at camp (the parties stipulated that appellant was in custody in Camp Paige on that date).

On July 7, 2011, at 6:27 p.m., Jose was interviewed by Sergeant Gray. According to Sergeant Gray, he showed Jose purported DNA samples from appellant and Alvarez and asked him which one would match the shooter. Jose looked right at appellant's sample. Sergeant Gray also said there were two sources of DNA on the gun, one of which was Jose's.[4] Jose replied that he did not touch the gun that night but had touched it the week before.

Jose said appellant and Alvarez went with him to the party because rival gang members from CLPS would be there and they wanted to "gangbang." Jose said a man with a noz tank was there, and appellant asked for three balloons for one dollar. The man said no, and appellant told him, "Hey, you know where you at, ese?" The man said he was in CLPS hood. Appellant pulled a gun from his waistband and pointed it at the man's face. The gun made a "click, click, click," noise, then fired. Jose saw the bullets hit the victim in the head and leg. Appellant then ran down Indiana and made a left onto Lanfranco. Sergeant Gray asked if appellant was the shooter, and Jose said, "Yeah." Jose said "the big homie" (Philip Gallegos) told him not to say anything and to blame the Laguna Park gang.

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[4] In truth, no DNA was detected on the revolver, and insufficient DNA to test was detected on the two live cartridges.

On July 11, 2011, at 5:50 p.m., Jose, who was at his probation office, talked to Sergeant Gray on the telephone. Sergeant Gray confirmed that they had recovered the murder weapon, and Jose asked if the DNA "came out positive." Sergeant Gray said the DNA did match Jose and that he had submitted the DNA for analysis as to appellant. Jose repeated the version of the shooting he had provided in the July 7 interview. He also said that Alvarez was next to appellant during the shooting, and that Gallegos had told him that he was driving in the area when the shooting happened.

Jose and his family were relocated after the case was filed, sometime in 2012. For trial, Sergeant Gray tried to serve Jose with a subpoena, but Jose refused to come to court and said he would not testify. When called as a witness at trial, Jose expressed the fear of being killed.

Appellant's Plea Discussions

Recordings of portions of two telephone conversations appellant had while in custody awaiting trial with an unidentified woman were played at trial. From the content of the conversations, it appears that the woman was appellant's girlfriend: they referred to each other as "baby," and she referred to him as "my love." In the first conversation, which occurred on February 9, 2016, the woman said she hoped appellant would have a good day at court tomorrow and that "they will tell you good news." Appellant said, "If they offer me a deal without the L, I'm taking it, alright. I let you know right now."

In the second conversation, which occurred the next day, February 10, 2016, the woman asked what happened. Appellant said that jury selection would be starting in his trial on "the 29th," and he would be going back to court on "the 24th." He said, "My lawyer asked me um, 'Hey what's up, you going to take the 15 with the L?' I'm like, 'Hell nah.' . . . Man. I feel like, 'What about 20 with a strike? I mean, I'll sign right now.'" He said his attorney told him that "the DA needs to go over his witnesses to see if . . . they're reliable," and after that "they could offer me good, they could offer me no deal, or they could offer me a deal without the L." The female replied, "anything without the L." Appellant said, "I go back to see what happens and, after that, fuck homie dude. They offer me nothing without the L." The female interrupted, "They just keep postponing it and postponing it." Appellant replied, "Yeah [unintelligible] my lawyer like, what's up? I'm tired of coming to court already. Like I just want to get it over with."

Gang Expert Testimony

Los Angeles County Sheriff's Detective Noel Lopez, assigned to Operation Safe Streets for East Los Angeles, the gang unit, testified about Little Valley gang member culture, including "putting in work" or committing crimes, gaining respect through committing crimes, committing crimes against rival gang members, gang reputation, and snitching or telling on someone. Detective Lopez testified that if a person snitched, he would be killed. Gangs sometimes had "hood guns" which were passed around to different members.

In 2010, Little Valley had about 100 gang members and at the time of trial had 111 documented gang members. Little Valley's territory in East Los Angeles included Yoly's Market and the surrounding area. Little Valley's rivals included CLPS and Laguna Park. The house where the shooting occurred was in the CLPS hood. The primary activities of Little Valley were murder, attempted murder, robberies, stolen vehicles, methamphetamine sales, vandalism, and tagging. Evidence of predicate crimes committed by two Little Valley gang members was presented.

Detective Lopez opined that appellant, Alvarez, Jose, Diaz, and Gallegos were all Little Valley gang members. Appellant's gang monikers were "Klepto" and "Blinks." Gallegos was a Little Valley shot caller–a "big homie"–who told other gang members what to do.

When presented with a hypothetical situation based on the facts of this case, Detective Lopez opined that the murder was committed in association with and for the benefit of the Little Valley gang.

DISCUSSION

I. *Willingness to Plead Guilty*

Appellant contends that the trial court erred under Evidence Code section 352 in admitting two recordings of telephone conversations, made while he was in custody awaiting trial, in which he expressed to an unidentified woman (presumably his girlfriend) a willingness to plead guilty to a determinate term to avoid a life sentence. In the first conversation, on February 9, 2016, he said, "If they offer me a deal without the L, I'm taking it, alright. I let you know right now." In the

second conversation on February 10, 2016, he said that he had told his lawyer he would not plead guilty for a life sentence. He also told the lawyer "Man. I feel like, 'What about 20 with a strike? I mean, I'll sign right now.'" We review the trial court's ruling for abuse of discretion (*People v. Pollack* (2004) 32 Cal.4th 1153, 1171), and find no error.[5]

As recognized by the California Supreme Court, although decisions from other jurisdictions are in conflict, under long-standing California case authority, absent a statute prohibiting the admission of a criminal defendant's offer to plead guilty, such evidence is admissible as evidence of guilt. (*People v. Wilson* (1963) 60 Cal.2d 139, 155 [citing cases and noting conflict in other jurisdictions] (*Wilson*); see *People v. Wissenfeld* (1951) 36 Cal.2d 758, 764 [in rejecting claim of insufficient evidence, court described defendant's "offer to plead guilty to the alleged violation constituting count 2 if he could be guaranteed a county jail sentence" as "an admission of guilt"]; *People v. Boyd* (1924) 67 Cal.App. 292, 302 [opn. of Supreme Court on denial of hearing; defendant's offer to plead guilty was an admission on his part of the truth of the charge that he obtained money under false pretenses, which, with the other evidence, was properly left to the consideration of the jury]; *People v.*

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[5] Before trial, the prosecution filed a motion in limine to admit appellant's statements, and appellant filed a motion in limine to exclude that evidence. Appellant argued that the evidence was inadmissible under Evidence Code section 352. The trial court gave a tentative ruling that the evidence was admissible: the prosecution could argue the statements established a consciousness of guilt, and the defense could argue appellant was willing to plead to a determinate sentence to avoid a life sentence. When the evidence was admitted at trial, defense counsel objected based on his prior motion in limine. The trial court overruled the objection.

Cooper (1947) 81 Cal.App.2d 110, 117-118 [offer to plead guilty was admissible as implied admission of guilt]; *People v. Sanderson* (1933) 129 Cal.App. 531, 533 [offer to plead guilty "would seem very competent to be considered, with the other evidence, on the question whether or not appellant committed the burglary. The statement seemed to be voluntarily made by defendant himself, and it had a direct bearing on the issue raised by the plea of not guilty"]; see also *People v. Ivy* (1958) 163 Cal.App.2d 436, 438-440 [plea of guilty later withdrawn held admissible]; *People v. Snell* (1929) 96 Cal.App. 657, 662-663 [same], later abrogated by statute.)

Two statutes have been enacted abrogating this case law under limited circumstances. Section 1192.4, enacted in 1957, applies to withdrawn pleas, and provides: "If the defendant's plea of guilty . . . is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available. The plea so withdrawn may not be received in evidence in any criminal, civil, or special action or proceeding of any nature." Evidence Code section 1153, enacted in 1965, likewise applies to withdrawn pleas, and also to offers to plead guilty. It precludes the admission in any action of "[e]vidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action."

These provisions are a legislative determination that excluding rejected guilty pleas or offers to plead from evidence "promote[s] the public interest by encouraging the settlement of criminal cases without

the necessity of a trial." (*People v. Sirhan* (1972) 7 Cal.3d 710, 745, overruled on another point in *Hawkins v. Superior Court* (1978) 22 Cal.3d 584; *Wilson, supra*, 60 Cal.2d at p. 156.) This policy applies not only to pleas and offers to plead, but to "admissions made in the course of plea negotiations." (*People v. Tanner* (1975) 45 Cal.App.3d 345, 351.)

However, these statutes do not apply to statements made outside the context of "bona fide plea negotiations." (*People v. Magana* (1993) 17 Cal.App.4th 1371, 1376 (*Magana*); see *People v. Leonard* (2007) 40 Cal.4th 1370, 1404.) "Bona fide plea negotiations include statements made to the trial court and to the prosecuting attorney because those are the participants in a plea bargain. [Citation.] On the other hand, bona fide plea negotiations do not include statements to transporting police officers [*People v. Posten* (1980) 108 Cal.App.3d 633, 647-648,] or statements made in anger to the trial court [*Sirhan*, *supra*, 7 Cal.3d at pp. 745-746]." (*Magana, supra*, 17 Cal.App.4th at p. 1377.) Nor, as here relevant, do they apply to a defendant's declarations of willingness to plead guilty made to a third party who has no connection to the plea process. (*Magana, supra*, 17 Cal.App.4th at p. 1377 ["statement[s] contained in a letter to a fellow gang member, that he would accept a good deal if it were offered [to him]" cannot be construed as taking place in the context of "a bona fide plea negotiation"].) As explained in *Magana*: "The prohibition . . . on the use of offers to plead guilty and statements made attendant thereto helps to implement the sound public policy of encouraging settlement of criminal cases by encouraging candor in plea negotiations. [Citation.] The accused and defense

counsel are assured that anything said will not be used against them if the negotiations are unsuccessful. However, there is no need to protect the defendant's voluntary disclosures about the bargaining process made to third persons uninvolved and unnecessary to the plea negotiations." (*Ibid*.)

In the instant case, appellant concedes that introduction of the statements at issue was not prohibited by section 1192.4 or Evidence Codes section 1153. He made the statements to his apparent girlfriend in recorded telephone conversations while in custody, not in bona fide plea negotiations. However, despite California case authority holding offers to plead guilty admissible (absent applicable statutory preclusion), he contends that his conversations should have been excluded under Evidence Code section 352, which gives the trial court discretion to exclude evidence if its probative value is "substantially negated" by the probability that admitting it will unduly prolong the proceeding, prejudice the opposing party, confuse the issue or mislead the jury. He argues that criminal defendants often offer to plead guilty not because they committed any crime, but for other reasons, such as to avoid a longer prison sentence if convicted at trial. (See *North Carolina v. Alford* (1970) 400 U.S. 25, 31, 33.) He asserts that the evidence suggested that he was considering a guilty plea not because he shot Guzman, but because, at his young age, he feared serving the rest of his life in prison. Thus, according to appellant, his statements of willingness to plead guilty to avoid a life sentence did not constitute implied admissions of guilt.

We find no abuse of discretion in the trial court's ruling. Appellant had been identified as the shooter by both Alonzo Diaz and Jose Sevilla, whose versions of the shooting were amply corroborated by independent evidence. The undisputed evidence portrayed the shooting as an unprovoked, gang-related murder. Appellant himself had made damning admissions to Christopher Alvarez in a recorded conversation while both were in custody: he admitted he "cleaned" the gun used to kill Guzman after the shooting, and "tossed it away" "[w]here the fool gave it back to the cops," referring to Elipidio Duarte, in whose backyard the gun was recovered. Given the strength of the evidence against him, including his own incriminating statements to Alvarez, the jury could reasonably infer that appellant's expressed desire to plead guilty was motivated not by the desire to avoid a life sentence even though he was innocent, but by the knowledge he was guilty and had incriminated himself.

Nor was the evidence unduly prejudicial. To the extent there could be a contrary explanation for appellant's willingness to plead guilty–merely to avoid a life sentence if convicted–that suggestion was apparent on the face of the statements. Under these circumstances, the trial court reasonably concluded that the significance of appellant's statements was properly left to the jury.

Appellant relies primarily on two non-California authorities, neither of which is persuasive. In *State v. McCrory* (2004) 104 Hawaii 203 (*McCrory*), the defendant's cellmate testified that defendant (charged with murder) said he "'hope[d] that he could get the charges [against him] reduced to manslaughter.'" (*Id.* at p. 277.) The Hawaii

Supreme Court held that the testimony should have been excluded as unduly prejudicial, because the defendant's desire to have the charges reduced to manslaughter might have been motivated "for any number of reasons other than a 'consciousness of guilt.'" (*Id.* at p. 209.) Further, "a 'hope' that the charges would be reduced to manslaughter cannot be assigned anything but minimal probative value" to prove defendant guilty of murder. (*Id.* at p. 210.)

In *State v. Abel* (1928) 320 Mo. 445 (*Abel*), a death penalty case, the Missouri Supreme Court held the trial court erred in admitting the testimony of a prosecution investigator that defendant asked him to convey to the prosecutor an offer to "spill his guts" and turn state's evidence against his codefendants in exchange for a sentence of five years. The court reasoned that "[t]he offer by the defendant was not an extra-judicial confession; it was an attempted negotiation for a compromise, not of a felony, but of the punishment to be inflicted. The defendant was charged with a capital offense; he stood in the shadow of the gallows. His offer was not inconsistent with a plea of not guilty. By his offer he, in effect, said he would plead guilty on condition that his punishment would be assessed at imprisonment in the penitentiary for five years rather than take the chance of the death penalty." (320 Mo. at p. 451.) The court held: "The offer to plead guilty should have been accepted and sentence passed upon it, or it should have been rejected and 'never have been heard of again.' The prosecuting attorney should not have been allowed to reject the conditional offer and afterwards use it against the defendant at the trial." (*Id.* at p. 451.)

McCrory and *Abel* are factually distinguishable from appellant's case. In *McCrory*, the court reasoned that the defendant's hope for a reduced charge of manslaughter did not reasonably suggest that defendant was guilty of the greater charge of murder. By contrast, in the instant case, as we have explained, given the strength of the evidence against defendant (including his own statements to Alvarez), it could reasonably be inferred that appellant's desire to plead guilty to avoid a life sentence was motivated by the knowledge that he would be convicted of murder because he was guilty of that crime. In *Abel,* the court treated the defendant's statements as part of bona fide plea negotiations–a direct attempt by the defendant, through the investigator, to enter plea negotiations with the prosecutor, which the prosecutor should not have been allowed to reject and then use against the defendant. Here, defendant's statements were made to his girlfriend, outside of bona fide plea negotiations, in recorded conversations from jail.

Finally, to the extent that, despite these distinguishing factors, *McCrory* and *Abel* might suggest that the evidence in the instant case was inadmissible, they are inconsistent with long-standing California case authority, as recognized by the California Supreme Court: "In the absence of statute, it has been held in California that an offer to plead guilty is admissible in evidence." (*Wilson*, *supra,* 60 Cal.2d at p. 155.)

Thus, we decline to follow them, and find no abuse of discretion in the trial court's ruling.[6]

Even if the trial court erred in admitting the evidence, it is not reasonably probable that a different result would have been reached in the absence of the error. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611 [mere erroneous exercise of discretion regarding admission of evidence under normal rules of evidence does not implicate federal constitution, and is judged under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836].) Alonzo Diaz' testimony and Jose Sevilla's out-of-court statements implicating appellant as the shooter were compelling and amply corroborated by independent evidence. Appellant's tape-recorded admission to Christopher Alvarez that he cleaned and disposed of the murder weapon after the shooting, while not expressly admitting he was the shooter, strongly suggested (in light

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[6] Appellant also briefly refers to *U.S. v. Galindo* (9th Cir. 1990) 913 F.2d 777 (*Galindo*) and *Blue v. State* (Tex. Crim. App. 2000) 41 S.W.3d 129 (*Blue*). In both of those cases, the trial judges improperly advised the jury of abandoned plea negotiations to explain delays during the course of the trials. In *Blue,* the appellate court found the judge's reference to inadmissible plea negotiations constituted "fundamental error" requiring consideration of the issue on appeal despite the failure to object at trial. (*Blue, supra*, 41 S.W.3d. at p. 131.) In *Galindo,* the Ninth Circuit found the error to be of "constitutional dimension," entitling the defendants to a new trial "unless the government can prove that no reasonable possibility exists that the court's statement contributed to the jury's verdict." (*Galindo, supra*, 913 F.2d at p. 779.) Here, the evidence in question was not elicited through improper comments by the trial judge, but through recordings of appellant's own words to his apparent girlfriend, thus avoiding any implication (as in *Blue* and *Galindo*) that the judge thought the defendant was guilty and should have accepted a plea.

of the other evidence) that he was. Under these circumstances, even if the trial court had excluded the evidence of the two brief conversations in which appellant said he was willing to plead guilty to a determinate term to avoid a life sentence, it is not reasonably probable that a different result would have been reached.

Expert Testimony

Appellant contends that the trial court erred in requiring him to testify to his state of mind before admitting expert testimony on why innocent defendants plead guilty. Appellant misconstrues the record, and in any event the contention is meritless.

In the defense motion in limine to exclude defendant's statements indicating a willingness to plead guilty for a less-than-life sentence (see fn. 5, *ante*), defense counsel argued that admission of the evidence would require the undue consumption of time, because he would seek to explain appellant's willingness to plead guilty by introducing statements made to him by interrogating officers, other inmates, family members, friends, and his attorneys regarding the strength of the evidence against him and the consequences of conviction. He also proposed introducing "[e]xpert witness testimony regarding false confessions and guilty pleas." He did not identify any proposed witnesses, and made no offer of proof as to what specific testimony he would seek to introduce.

When the motion was heard, the trial court explained that in an off-the-record chambers discussion, it had "stated tentatively" that it would allow admission of defendant's statements. It further explained

that "it would not be inclined to allow any expert witness and/or . . . an attorney . . . to be called as a witness of what they routinely advise their clients with respect to the possible consequences of taking a plea. . . . [T]he court would allow, depending on what kind of evidence you may have, individuals who purportedly spoke to [appellant] regarding the possible consequences . . . of a life sentence should the verdict be against him. But that . . . only becomes relevant once that issue is placed at issue, and that would be the state of mind of the defendant . . . whether it be by the defendant taking the stand or other means showing that the reason that he made those statements and was willing to accept a determinate plea was his fear of facing a life sentence."

Defense counsel argued that appellant's state of mind was put in issue by introduction of his statements indicating a willingness to plead guilty, and so "whether or not the defendant takes the stand, it is an issue that I believe I should be able to address by expert witnesses." The court disagreed, and replied that defendant's state of mind in making the statements was not automatically in issue, and that some evidence was required to link any expert testimony to appellant's thought process. Defense counsel submitted on the point, and the court stated, "Okay. And if you have–we'll take it up–these are tentative but–okay."

The prosecutor then stated that "as to the issue that the court is addressing about how it may be addressed at a future point, I would just ask that we do a 402 at that time." The court replied that "[t]here would have to be an offer of proof . . . and there would have to be a sufficient foundation at that point."

During trial, defense counsel never made an offer of proof as to what evidence, if any, he sought to introduce, and defendant did not testify. Nonetheless, appellant raised the issue again in his motion for new trial. In denying the motion, the court observed that "[n]o proper foundation, as the court stated during trial, was established, whether it be by the defendant having taken the stand or by other evidence regarding what his state of mind was and/or the particular reasons behind his having made such a statement regarding his willingness to plead guilty. The defense sought to introduce evidence in rebuttal . . . regarding why 'generally' an accused may seek to enter a guilty plea under various scenarios."

On appeal, appellant contends that the trial court erred in requiring him to testify to his state of mind before admitting expert testimony on why innocent defendants plead guilty. For several reasons, appellant's claim fails. First, the ruling appellant challenges was only a tentative ruling. The court's comments were clear: if defense counsel intended to introduce expert testimony, he would have to make a specific offer of proof as to the evidence he was seeking to introduce, and show how it was relevant to appellant's state of mind. Defense counsel never raised the issue again, and never made an offer of proof. Therefore, the trial court was never given the opportunity to make an informed, final ruling subject to review on appeal. And were we to review the issue and find error (we do not), we would be unable to assess the possible prejudice because we cannot know with any certainty who appellant's supposed expert might have been, and what that witness might have offered as testimony. Thus, the issue is

forfeited. (See *People v. Heldenburg* (1990) 219 Cal.App.3d 468, 474, and cases therein cited [failure to secure a ruling forfeits contention on appeal].)

Second, even if the trial court's tentative ruling were a final ruling (it was not), appellant mischaracterizes it. The court did not expressly condition introduction of expert testimony on appellant testifying to his state of mind, but on evidence–whether it be defendant's testimony *or other evidence*–tending to prove that defendant wished to plead guilty not because he was guilty, but for the reasons that might be explained by any proposed expert witness. Requiring such a foundation, tethering any expert testimony to the evidence presented at trial, was not an abuse of discretion. (*People v. Richardson* (2008) 43 Cal.4th 959, 1008 [an expert's opinion may not be based "'on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors. . . . [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?' [Citation.]"]

Third, on the evidence presented here, it is not at all apparent that the issue was ripe for expert testimony. To be admissible, expert testimony must be "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Here, defense counsel wished to have the jury infer that appellant's expression of willingness to plead guilty to a determinate term was not an admission of guilt, but rather a

reflection of his fear he would be sentenced to life if he lost at trial. But that possible inference was apparent on the face of appellant's statements. Appellant was conversing with a woman who was his apparent girlfriend (they called each other "baby," and she called him "my love"). He expressed to her his fear of receiving a life sentence and frustration at not being offered a non-life sentence, and said he was tired of going to court and just wanted to get it over. His girlfriend was sympathetic and supportive, and expressed the wish (in the February 10 call) for "anything without the L."

On that evidence alone, and given appellant's age (22 at the time of trial), the jury did not need expert testimony to permit the possible inference that appellant was offering to plead guilty because he was being worn down, was afraid of receiving a life sentence at trial (a fear shared by his girlfriend), and wanted a sentence less than life so that he could get out some day. Indeed, defense counsel made that point in closing argument.

He argued, "Now, I think this was kind of a cheap shot, the district attorney introduced the statement, you know, 'I'll take 20. I'll sign right now for 20. I don't want L. I don't want L.' Here is a 20-year-old kid [*sic*], 16 at the time of this occurrence, and he's in custody. Who knows what he's hearing?"

After an objection was sustained to defense counsel's comment about "people making confessions and then being exonerated," defense counsel continued, "When the government says 'life' to a 20-year-old [*sic*]–my goodness. You know, he knows the system. He's been in jail

for the last four years. He sees what's happening. 'Man, I'll do anything not to get life.' And to a 20-year-old 'life' means 'life.'"

After an objection was sustained to his comment that appellant "doesn't know the legalities, the intricacies of sentencing," defense counsel continued: "That's no admission of guilt, ladies and gentlemen. That's a young man's reality of a possible defeat. If he loses, 'Oh, my God, I'll get life. Maybe I should take 20. I'll still be young.' Who knows what's going on in his mind. That's no admission of guilt. It's completely out of context also. And I would urge you to ignore it."

In short, on the record presented, no expert testimony was required to offer the jury an alternate interpretation of appellant's willingness to plead guilty for a non-life sentence. As the trial court stated in its tentative ruling: "the People can argue that [appellant's statements] show or establish a consciousness of guilt [and] on the other side, defense counsel can argue to the jury that these statements were the result of not so much [appellant] admitting guilt, but rather . . . fear of the consequences of facing a life sentence should the jury be adverse to him."

Third Party Culpability

Defense counsel requested that the trial court give a proposed instruction on third party culpability, on the theory that the evidence suggested Jose Sevilla might have been the shooter.[7] He referred to

[7] The proposed instruction stated: "Evidence has been offered that a third party, Jose Sevilla, was the perpetrator of the charged offense. It is not required that the defendant prove this fact beyond a reasonable doubt. In

evidence that "Sevilla was at the party where the shooting took place, he knew . . . how many bullets were in the gun, he knew that the gun clicked twice before it went off, he knew exactly where the victim was shot, and he admits being enmeshed in the conversation between the victim and the alleged shooter." Relying on *People v. Hartsch* (2010) 49 Cal.4th 472, 504 (*Hartsch*) and *People v. Mackey* (2015) 233 Cal.App.4th 32 (*Mackey*), the trial court refused the request, though defense counsel was not precluded from arguing that the evidence regarding Sevilla raised a reasonable doubt of appellant's guilt. Thereafter, defense counsel argued that point at length to the jury.

We find no error, and no prejudice. First, because the proposed instruction told the jury that "[e]vidence has been offered that a third party, Jose Sevilla, was the perpetrator of the charged offense," the instruction was "unduly argumentative." (*Hartsch, supra,* 49 Cal.4th at p. 504; see *Mackey, supra,* 233 Cal.App.4th at p. 112.) "It is improper for an instruction to indicate an opinion favorable to the defendant regarding the effect of the evidence." (*Ibid.*) Second, as the Supreme Court observed in *Hartsch*: "We have noted that similar instructions [on third party culpability] add little to the standard instruction on reasonable doubt. [Citation.] We have also held that even if such

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order to be entitled to a verdict of acquittal, it is only required that such evidence raise a reasonable doubt in your minds of the defendant's guilt. However, the weight and significance of the evidence of Mr. Sevilla's guilt, if any, are for your determination. If after consideration of this and all of the other evidence, you have a reasonable doubt that the defendant committed this offense, you must give the defendant the benefit of the doubt and find him not guilty."

instructions properly pinpoint the theory of third party liability, their omission is not prejudicial because the reasonable doubt instructions give defendants ample opportunity to impress upon the jury that evidence of another party's liability must be considered in weighing whether the prosecution has met its burden of proof. [Citations.]" (49 Cal.4th at p. 504.)

In the instant case, the trial court gave the standard CALJIC instructions on reasonable doubt (No. 2.90), including the burden of proving identity based on eyewitnesses (No. 2.91). Appellant's "proposed instruction . . . simply restated the reasonable doubt standard in connection with the possibility that [Sevilla might be the perpetrator]. . . . The omission of this instruction, if error, could not have affected the verdict. It is hardly a difficult concept for the jury to grasp that acquittal is required if there is reasonable doubt as to whether someone else committed the charged crimes." (*Hartsch, supra*, 49 Cal.4th at p. 504.)

Remand

Defendant contends that even though defense counsel made a brief record of mitigating factors relevant to appellant's future youthful offender parole hearing in light of *People v. Franklin, supra,* 63 Cal.4th 261, his case should be remanded to allow presentation of a more complete record, because his sentencing hearing was held only two weeks after *Franklin* was decided and it was likely that defense counsel did not have adequate time to do a full investigation. In the

alternative, he contends that his attorney was ineffective. We disagree with both contentions.

For the sentencing hearing, defense counsel filed a written sentencing memorandum arguing that appellant should be sentenced to no more than 25-years-to-life and that a sentence of 40-years-to-life would be the functional equivalent of life without parole. The prosecution argued in response that a 40-year-to life sentence would not be the functional equivalent of life without parole, because under sections 3051 and 4801, appellant would be eligible for a youthful offender parole hearing after 25 years.

The sentencing hearing was scheduled for May 26, 2016. On that date, both the court and defense counsel anticipated that the *Franklin* decision would be filed later that day. Therefore, the court continued the sentencing hearing, to June 9, 2016.

As the court and defense counsel anticipated, the *Franklin* decision was issued May 26, 2016. In *Franklin,* the court held that juvenile offenders (such as appellant) who are serving lengthy sentences but are eligible for a youthful offender parole hearing in the 25th year of incarceration under sections 3051, 3046, subdivision (c), and section 4801 are not serving sentences that are the functional equivalent of life without parole. (63 Cal.4th at pp. 279-280.) The court further held that an eligible juvenile offender juvenile should have "an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination" under section 3051. (63 Cal.4th at p. 286.) Because it was "not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that

sections 3051 and 4801 deem relevant at a youth offender parole hearing," the court "remand[ed] the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing. [¶] If the trial court determines that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Id.* at p. 284.)

In the instant case, at appellant's sentencing hearing on June 9, 2016, defense counsel stated that he had read and understood the *Franklin* decision. He thereafter made a record of relevant factors. He stated: "Based on the *Franklin* case, which the court has cited, at this point I wish to state some things for the record regarding Mr. Salazar.

"First of all, the jury found him guilty of second-degree murder versus first-degree murder, which I think is a mitigating factor.

"And Mr. Salazar's parents were divorced. He was–basically, came from a broken family. His father did time in prison. And from a very young age, he was influenced by the gang culture. His older brother is in a gang. I believe his father was in the gang culture.

"And based on, you know, what we know scientifically and socially about youth, I would ask that some time down the road the parole board takes these matters into consideration.

"Thank you."

The trial court observed that "under the *Franklin* case, the court did state that it was important to allow counsel to make the statements that [defense counsel] has just placed on the record for mitigation consideration by the parole board in the future, and he's done that at this point."

It is true, as appellant observes, that defense counsel's statement of relevant youth-related factors was brief and general, but on this record it cannot be said, in the language of *Franklin,* that it is unclear "whether [appellant] had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (63 Cal.4th at p. 284.) *Franklin* was decided two weeks before the sentencing hearing. Defense counsel stated that he understood the decision. He did not state that he had had insufficient time to gather requisite evidence, and did not request a continuance. Rather, he listed the factors he believed relevant for a future youthful offender parole hearing. The trial court expressly found

that defense counsel's statement complied with *Franklin*. Thus, there is no need to "remand the matter to the trial court for a determination of whether [appellant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (63 Cal.4th at p. 284.) The trial court already made that determination.

Appellant contends in the alternative that his attorney was ineffective for not producing psychological evaluations and not "fleshing out and putting into admissible form the broad statements" he made at sentencing. "To prevail on a claim of ineffective assistance of counsel, a defendant '"must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice."' [Citation.] A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. [Citation.] Moreover, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

In the instant case, nothing in the appellate record suggests that defense counsel failed to render reasonable professional assistance, or that appellant suffered any prejudice. Although appellant committed the murder when he was 16, there was a long delay before his trial and sentencing, by which time he was 22-years-old. Nothing in the record suggests that he had undergone any prior psychological evaluations. Further, there is no basis to infer that any evaluation that might have been performed for his sentencing, by which time he was 22 years of age, would have revealed any helpful evidence relevant to his maturity level or other youth-related factors six years earlier when he committed the crime. Nor is there any basis in the record to conclude that family members, friends, or other persons would have provided evidence that would aid him in his future youthful parole hearing. For the same reason, there is no basis to conclude that had defense counsel produced psychological evaluations or other evidence, a record more favorable to appellant would have been created. Finally, we note that if other favorable evidence exists or develops, appellant will have the opportunity to present it at the parole hearing. (See § 3051, subd. (f).)[8]

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[8] Section 3051, subdivision (f) provides in relevant part: "(1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual. [¶] (2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board."

Thus, we conclude that he has failed to prove that his attorney was ineffective.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.